IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED AMERICANS FOR PUBLIC SCHOOLS AS AMICUS CURIAE

Henry C. Clausen
234 Van Ness Avenue
San Francisco, Calif. 94102
Attorney for Amicus Curiae

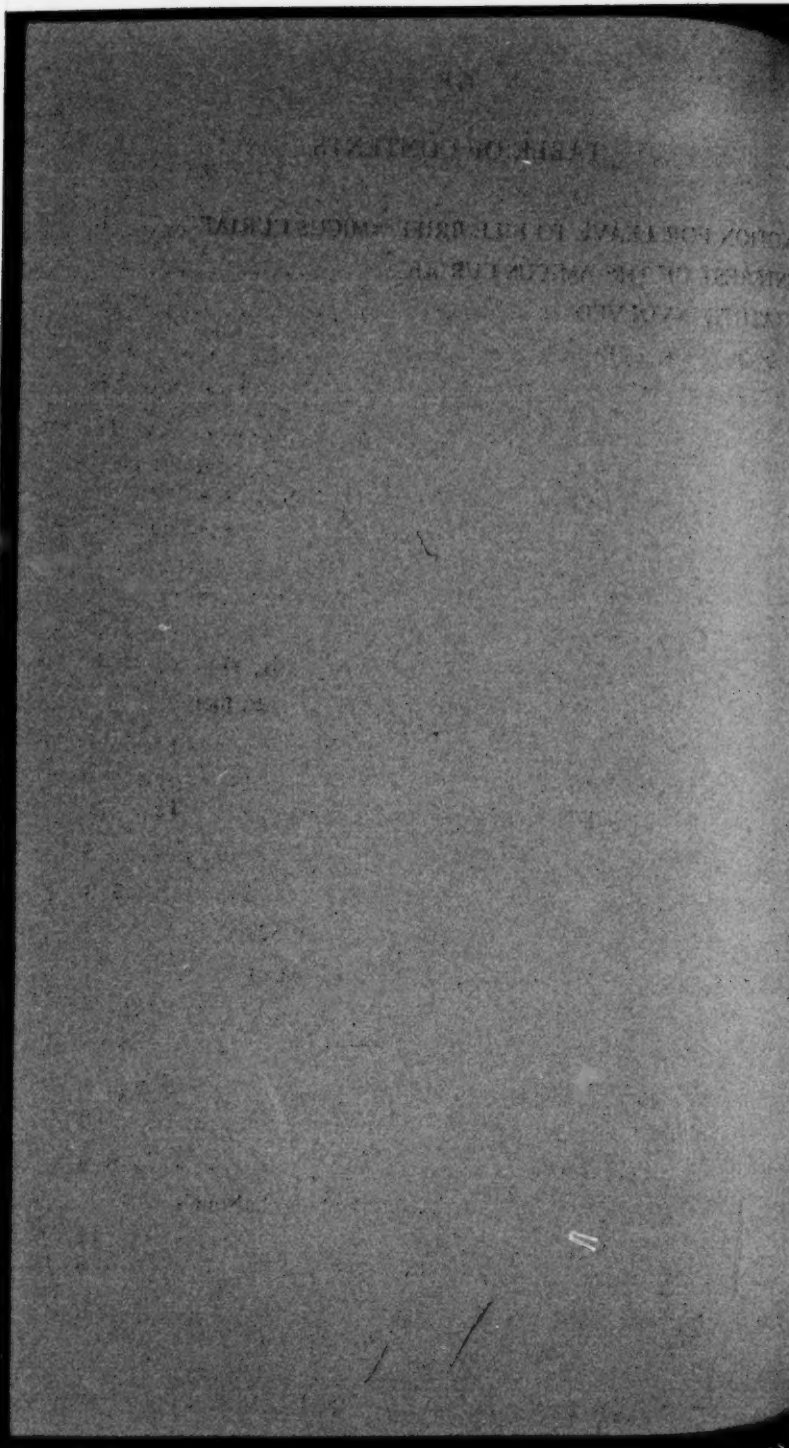

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ... 1
INTEREST OF THE AMICUS CURIAE 4
STATUTE INVOLVED 5
THE QUESTION PRESENTED 6
STATEMENT OF THE CASE 6
CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Board of Education v. Allen, 392 U.S. 236 6
Brown v. Piper, 91 U.S. 37, 42 7
DeCew v. Union Bag & Paper Corp. 59 Fed Sup. 301, 313 ... 8
Dwinell-Wright Co. v. National Fruit Products Co., 140 Fed. 2d 618-624 7
Dyer v. Superior Court, 94 Cal. App. 260, p. 268 7
Everson v. Board of Education, 330 U.S. 1 (1947) 11
Flast v. Cohen, 392 U.S. 83 5
Friend v. Burnham & Morrill Co., Fed. 2d 150 ..... 7, 8
Greeson v. Imperial Irrigation District, 59 Fed. 2d 529 7
National Surety Corporation v. First National Bank of Indiana, 106 Fed. Sup. 302 8

Other Authorities:

Catholic Viewpoint on Education, Neil McClusky, S. J. Doubleday 9
Encyclical of Pope Pius XI 8, 9
Phi Delta Kappan (June 1962 issue) Dr. George R. LaNoue's Findings 11
31 C.J.S. 835 7
9 Wigmore, Evidence §2568a 8

Constitution:

U.S. Constitution First Amendment 5, 12

U.S. Constitution Fourteenth Amendment 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

MOTION OF UNITED AMERICANS FOR PUBLIC SCHOOLS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

United Americans for Public Schools, pursuant to Rules of this Court, respectfully applies to this Court for leave to file its annexed brief as an amicus curiae in support of Appellants in the above entitled action, on the following grounds:

1. Amicus Curiae has obtained consent of the Appellants but not of all the parties herein within the time prescribed for filing briefs for the reason that its counsel, resident in California, has not been able to review all the briefs on file to ascertain whether there is need for additional commentary. Having reviewed some of said briefs, it appears that there is such need, and that the points raised in the annexed brief will present additional points not yet raised and will be helpful to the Court. The special considerations will appear more fully herein.

2. The questions presented by the above-entitled action include those set forth in Appellants' Jurisdictional Statement, to which amicus refers and incorporates herein. In addition to said presented questions, amicus suggests the following:

In deciding whether the primary purpose and principle effect of the Act is to aid religious institutions, may the Court construe the Appellants' complaint so as to permit evidence or judicial notice that all teaching in church schools is permeated with religious instruction, including authoritative Roman Catholic Papal and Cannonical law pronouncements and related texts.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective educational facts and findings to preserve the purposes of public schools and of the said constitutions, and to foster adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of its concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state aforesaid, (2) because the statute under attack but held valid below constitutes an outright subsidy to church schools of public funds, contrary to established principles of separation of church and state, (3) because the holding below unduly restricts the holding in *Flast v. Cohen*, 392 U.S. 83, wherein movant filed its amicus curiae brief on behalf of appellants who successfully prevailed in this Court and in a holding that plaintiffs, similar to those in the instant case, had standing to sue, (4) because the Court below misinterpreted *Board of Education v. Allen* so as to foreclose appellants from proving the sectarian nature of the teaching in recipient schools and (5) because the Court-approved device of using legislative findings to foreclose such proof will give to churches everywhere, including California, carte blanche to make inroads on public funds.

4. Reasons for submission of brief.

Movant has reason to believe that some vital questions of law, relevant to the issues herein, have not been fully covered therein. These include elaboration upon the misuse of *Board of Education v. Allen*, to prevent proof of the sectarian nature of teaching in church schools.

It is respectfully requested on the above grounds that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

UNITED AMERICANS FOR
PUBLIC SCHOOLS

By/s/ Henry C. Clausen
Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

BRIEF

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special refer-

ence to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective and educational facts and findings to preserve the purposes of public schools and of the said constitutions, and to foster adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of its concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state aforesaid, (2) because the statute under attack but held valid below constitutes an outright subsidy to church schools of public funds, contrary to established principles of separation of church and state, (3) because the holding below unduly restricts the holding in *Flast v. Cohen*, 392 U.S. 83, wherein movant filed its amicus curiae brief on behalf of appellants who successfully prevailed in this Court and in a holding that plaintiffs, similar to those in the instant case, had standing to sue, (4) because the Court below misinterpreted *Board of Education v. Allen* so as to foreclose appellants from proving the sectarian nature of the teaching in recipient schools and (5) because the Court-approved device of using legislative findings to foreclose such proof will give to churches everywhere, including California, carte blanche to make inroads on public funds.

STATUTE INVOLVED

The statutory provisions involved in this suit appear in Appendix A to Appellants' Jurisdictional Statement to which amicus refers and incorporates herein, known as the Pennsylvania "Non-public Elementary and Secondary Education Act."

QUESTION PRESENTED BY THIS BRIEF

In order to avoid redundancy in briefing, amicus poses the following additional single question:

In deciding whether the primary purpose and principal effect of the act is to aid religious institutions, may the Court construe the Appellants' complaint so as to permit evidence or judicial notice that all teaching in church schools is permeated with religious instruction, including authoritative Roman Catholic Papal and Cannonical law pronouncements and related texts.

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Appellants' Statement.

I. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO PROVE THE ALLEGATIONS OF THEIR COMPLAINT THAT THE PRIMARY PURPOSE AND PRINCIPAL EFFECT OF THE ACT IS TO AID RELIGIOUS INSTITUTIONS, INCLUDING PROOF THAT CHURCH SCHOOLS IN GENERAL AND THE RECIPIENT ROMAN CATHOLIC CHURCH SCHOOLS IN PARTICULAR, COMPRISING NINETY PER CENT OF THE TOTAL NON-PUBLIC SCHOOLS AIDED, PERMEATE ALL SUBJECTS, ALL SECULAR OR SECTARIAN TEACHINGS, AND ALL PHASES OF ATTENDANCE AND SURROUNDINGS, WITH RELIGIOUS INSTRUCTION.

References to plaintiffs' complaint are set forth in its Jurisdictional Statement to this Court, including pages 4, 5, 9, 11, 15, 16, 18, and 19, and sufficiently form a base for such proof.

Board of Education v. Allen 392 U.S. 236, does not hold what the Court below says it holds. Rather, it confirms that the Court below erred in failing to permit proof, either by judicial notice or by introduction of evidence, of the sectarian nature of all teaching in parochial schools. The Court

below erroneously construed the *Allen* case as holding that all teaching in a sectarian school may not be religious and that the processes of secular textbooks are in fact instrumental in the teaching of religion. The Court in the *Allen* case did not so hold. Instead, it held on an appeal from a summary judgment that the meager record failed to support the proposition advanced. It pointed out that no evidence had been offered as to particular schools, particular courses, particular teachers or particular textbooks. Our case is the converse. Such evidence was offered, was available, was judicially noticable, all in support of specific allegations of the complaints, and the Court below erroneously refused to permit such introduction.

II. THE COURT MAY JUDICIALLY NOTICE THE PERMEATION PROOF.

It is within the power of the Court to consider and consult standard works of authority and usage of the customs and ecclesiastical law which govern religious denominations. The object and justification of such resort to printed books is the aid which the Court may expect in the exercise of the faculty of judicial notice.

31 C.J.S. 835
Dyer v. Superior Court 94 Cal. App.
260 p. 268

The Judge is free to consult on his own motion any sources he considers reliable and proper, including essays, magazines articles and brochures.

Brown v. Piper 91 U.S. 37, 42
Dwinell-Wright Co. v. National Fruit Products Co. 140 Fed. 2d 618-624
Greeson v. Imperial Irrigation District 59 Fed. 2d 529
Friend v. Burnham and Morrill Co. Fed. 2d 150

National Surety Corporation v. First National Bank of Indiana 106 Fed. Sup. 302
9 Wigmore, Evidence §2568a

A Court may take judicial notice of the facts in "standard works accessible in any considerable library".

Weck v. Parker 249 U.S. 130
DeCew v. Union Bag and Paper Corporation 59 Fed. Sup. 301, 313
Friend v. Burnham and Morrill Co., supra

III. THE FACTS WHICH THE COURT SHOULD HAVE PERMITTED TO BE SO ADDUCED OR JUDICIALLY NOTICED INCLUDE THE FOLLOWING:

Roman Catholic Papal Edicts and law require (1) that Roman Catholic parents send their children to its church schools, (2) that *all* subjects must be diffused and permeated with religious instruction and (3) that demands be made for public tax funds. The American church officials are merely executing and voicing these directives from Rome. Control is in Rome, regardless of the American hierarchy, on subjects such as birth control, dogma or education.

Roman Catholic Cannon Law provides:

> "Catholic children shall not attend non-Catholic, neutral, or mixed schools, namely, those which are open also to non-Catholics." (Cannon 1374)

The Encyclical of Pope Pius XI, (Five Great Encyclicals, The Paulist Press) reads:

> "We renew and confirm their declarations, as well as the Sacred Canons in which the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, is forbidden for Catholic children, and can

be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time and with special precautions." (Page 60)

and further:

"*It is necessary that all the teaching and the whole organization of the school, and its teachers, syllabus and textbooks in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the Church*; so that religion may be in very truth the foundation and crown of the youth's entire training; and this in every grade of school, not only the elementary, but the intermediate and the higher institutions of learning as well. To use the words of Leo XIII: 'It is necessary not only that religious instruction be given to the young at certain fixed times, *but also that every other subject taught, be permeated with Christian piety*." (Page 60) (Emphasis added)

Recent official interpretive books confirm this as the present Roman Catholic position. See "Catholic Viewpoint on Education" (by Neil G. McCluskey, S.J., Doubleday).

"Despite the fact that *religion* is taught formally for only brief periods, its *influence pervades other areas of the curriculum*. Religious themes receive proportionate treatment in other courses where they are integral to the subject. *This will occur particularly in literature, history, and social studies.*" (Page 74) (Emphasis added)

"These principles are not taught day by day by means of blackboard diagrams and class recitations. In a gentle imperceptible manner, however, their meaning is absorbed and they become quietly operative in the life of the Catholic child. Certain traditional religi-

> ous symbols silently telling of God, the Incarnation of His Son, man's Redemption by Christ, and the life of the blessed in heaven help to establish this atmosphere of the supernatural. The cross above the school building, the crucifix hanging in every classroom, and other religious symbols that adorn the walls serve constantly to remind the pupils of things that transcend this world. Even the clerical garb of the priest and the religious robes of the Sisters and Brothers–symbolizing dedication to the loftiest values of the spirit–contribute to this effect. (Page 78)
>
> "*The function of the Catholic school is not merely to teach the formulas of the Catholic religion but, as Father George Bull of Fordham University once said, 'to impart in a thousand ways, which defy formularization, the Catholic attitude toward life as a whole.'*" (Page 78) (Emphasis added)

And see "Catholic Schools in Action", (University of Notre Dame Press–1966):

> "Every Catholic school teaches religion, although it may by no means do so in the way others do. In all, symbols associated with the liturgy and prayer are intimately associated with the school day. The very presence of the religious is in itself a dominant, unforgettable symbol. Here are persons set apart from the world reminding that world not merely of sin, of justice, and of judgment, but also of the unavoidable choice between the holy and the unholy, between the things that are of time and the things that transcend time. One may rebel against all this, as many have, but even those who do not surrender to the school cannot erase its imprint from the texture of their minds. This one remembers about Catholic education when virtually all else may have been forgotten." (Page 17)

The extent to which the curriculum of church schools in general is permeated with denominationally slanted material has been scientifically demonstrated. Dr. George R. LaNoue made a study of more than 100 Roman Catholic and other church school textbooks. LaNoue's findings, summarized in the June 1962 issue of the *Phi Delta Kappan*, are as follows:

> "1. Religious symbols and subjects are commonly used in mathematics and language arts texts;
>
> "2. Specific sectarian doctrines are presented where controversial matter appears in science, geography, and language texts;
>
> "3. All subjects are presented with a general Christian theistic approach;
>
> "4. Texts in some subjects request that pupils concern themselves with specific church goals, such as working and praying that non-Western cultures will adopt Christianity or playing one's part in spreading the gospel message;
>
> "5. Appeals are made to church authority to prove points in many subject areas;
>
> "6. Selective emphasis is placed on denominational institutions and contributions to culture and on facts favorable to the particular church, while contributions to culture by other churches and facts unfavorable to the particular church are omitted;
>
> "7. Texts in a number of subjects defend denominational social ideas and regulations."

Hence, what Mr. Justice Jackson of the U.S. Supreme Court said in the Everson opinion, 330 U.S. 1, is true today:

> ". . . The parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice that venerable institution, I should expect, would

> forego its whole service for mature persons before it would give up the education of the young . . . Catholic education is a rock upon which the whole structure rests and to render tax aid to a church school is indistinguishable to me from rendering the same aid to the church itself."

CONCLUSION

The Supreme Court should vacate the Order dismissing the Complaint and either (a) remand with a direction to proceed with discovery and trial on both First and Fourteenth Amendment issues or (b) take judicial notice of the official Committee proceedings, transcripts, reports and journals of the House and Senate of Pennsylvania, and of the regulations and application forms promulgated by the Superintendent of Public Instruction, and of the fact that all teaching in church schools is permeated with religious instruction, and declare the Act unconstitutional on its face as violative of the First Amendment.

Respectively submitted,

/s/ Henry C. Clausen

June 1, 1970